

The Constitutional Law Scholarship of Thomas McIntyre Cooley

By Paul D. Carrington*

I. INTRODUCTION

Thomas McIntyre Cooley won a national reputation as a legal scholar unequalled by any American in his time. Between 1868 and 1879, he wrote original treatises on Constitutional Limitations,¹ Taxation,² and Torts,³ and edited Joseph Story's Commentaries on the Constitution⁴ and William Blackstone's Commentary on English Law.⁵ He also wrote several other books⁶ and many articles addressed to a general audience. He ceased his career as an author of legal texts in 1884,⁷ but some of his works, including the treatises on Constitutional Limitations and Torts were kept up by other authors for many years after his death.⁸ He has been cited hundreds of times by the Supreme Court of the United States⁹ and countless times by other American courts.

Although in his lifetime Cooley was regarded as America's greatest legal writer, his reputation has not fared well in this century. Chiefly this is so because he was cited, years after his death and decades after he had ceased writing, in Supreme Court opinions¹⁰ that were disapproved by

*Chadwick Professor of Law, Duke University. This paper is the product of a continuing project earlier supported by the John Simon Guggenheim Foundation and now supported by the E.T. Bost Fund, Cannon Trust III, of the Duke University School of Law. An early draft of this work was prepared under the roof of the Rockefeller Foundation. Derek Aponavitch, Clare Fried Drake, and Erika King helped with the references and made editorial suggestions. All rights are reserved. Please do not quote this draft without permission.

1. A Treatise on The Constitutional Limitations which Rest Upon The Legislative Power of the States of the American Union (1868) (hereafter cited as Constitutional Limitations).

2. A Treatise on the Law of Taxation Including the Law of Special Assessments (1876) (hereafter cited as Taxation).

3. A Treatise on the Law of Torts or The Wrongs which are Independent on Contract (1879) (hereafter cited as Torts).

4. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (4th ed., 1873) (hereafter cited as Story).

5. WILLIAM BLACKSTONE, COMMENTARIES ON LAWS OF ENGLAND (1871).

6. The General Principles of Constitutional Law (1880); Michigan: A History of Governments (1885).

7. The Elements of Torts (1895).

8. Later editions of Constitutional Limitations were produced by Alexis C. Angell (1890), Victor H. Lane (1903), and Walter Carrington (1927). Later editions of Torts were produced by John Lewis (1906) and Avery Haggard (1932).

9. Westlaw lists 714 citations; Lexis more than 1000.

10. *E.g.*, *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923).

writers assigning Cooley responsibility for their outcomes. It was supposed by many that he was a social Darwinist¹¹ of the stripe of Herbert Spencer¹² and William Graham Sumner.¹³ He was accused of conspiring to forestall and prevent progressive legislation.¹⁴ Extravagant inferences were drawn regarding Cooley's politics and his aims as a writer.¹⁵

11. J. FRANCIS PASCHAL, *MR. JUSTICE SUTHERLAND: A MAN AGAINST THE STATE* 9 (1951) (hereafter cited as PASCHAL).

12. HERBERT SPENCER, *SOCIAL STATICS OR THE CONDITIONS ESSENTIAL TO HUMAN HAPPINESS SPECIFIED AND THE FIRST OF THEM DEVELOPED* (1872) (hereafter cited as STATICS).

13. WILLIAM GRAHAM SUMNER, *WHAT SOCIAL CLASSES OWE TO EACH OTHER* (1920). See generally HARRIS E. STARR, *WILLIAM GRAHAM SUMNER* (1925).

14. See CLYDE E. JACOBS, *LAW WRITERS AND THE COURTS: THE INFLUENCE OF THOMAS M. COOLEY, CHRISTOPHER G. TIEDEMAN, AND JOHN F. DILLON UPON AMERICAN CONSTITUTIONAL LAW* 23-63 (1954) (hereafter cited as JACOBS); EDWARD S. CORWIN, *LIBERTY AGAINST GOVERNMENT: THE RISE, FLOWERING AND DECLINE OF A FAMOUS JUDICIAL CONCEPT* (1948); SIDNEY FINE, *LAISSEZ-FAIRE AND THE GENERAL WELFARE STATE: A STUDY OF CONFLICT IN AMERICAN THOUGHT, 1865-1901* 128-129 (1956); CHARLES G. HAINES, *THE REVIVAL OF NATURAL LAW CONCEPTS: A STUDY OF THE LIMITS ON LEGISLATURES WITH SPECIAL REFERENCE TO THE DEVELOPMENT OF CERTAIN PHASES OF AMERICAN CONSTITUTIONAL LAW* 117 (1930); KERMIT HALL, *THE MAGIC MIRROR: LAW IN AMERICAN HISTORY* 222-223 (New York, 1989); HAROLD M. HYMAN, *A MORE PERFECT UNION* 354-355, 516-519 (1973); Gary C. Leedes, *Justice George Sutherland and the Status Quo: A Biographical and Review Essay*, 1995 J. SUP. CT. HIST. SOC. 137 (1996); Max Lerner, *The Supreme Court and American Capitalism*, 42 YALE L. J. 668 (1933); PHILLIP PALUDAN, *A COVENANT WITH DEATH* 249-281 (1975); ARNOLD M. PAUL, *CONSERVATIVE CRISIS AND THE RULE OF LAW: ATTITUDES OF THE BAR AND BENCH 1887-1895* at 142-146 (1969); Stephen A. Siegel, *Historism in Late Nineteenth Century Constitutional Thought*, 1990 WIS. L. REV. 1431, 1516 n. 503; ANWAR SYED, *THE POLITICAL THEORY OF AMERICAN LOCAL GOVERNMENT* 64 (1966); LAURENCE H. TRIBE *AMERICAN CONSTITUTIONAL LAW* 571 n. 4 (2d ed. St. Paul, 1988); BENJAMIN TWISS, *LAWYERS AND THE CONSTITUTION: HOW LAISSEZ-FAIRE CAME TO THE CONSTITUTION* (1942) (hereafter cited as TWISS). More balanced in their presentation of Cooley are Thomas G. Barnes, *Introduction to Thomas M. Cooley, Constitutional Limitations* (1987 ed.); Michael Les Benedict, *Laissez Faire and Liberty: A Re-evaluation of the Meaning and Origins of Laissez Faire Constitutionalism*, 3 LAW AND HISTORY REVIEW 293 (1985); LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 545-546 (1973); HOWARD GILLMAN, *THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE* 55-59 (1993) (hereafter cited as GILLMAN); DAVID M. GOLD, *THE SHAPING OF NINETEENTH CENTURY LAW: JOHN APPLETON AND RESPONSIBLE INDIVIDUALISM* 137-139 (1990); WILLIAM E. NELSON, *THE ROOTS OF AMERICAN BUREAUCRACY* 5 and *passim* (1982); and *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE OF JUDICIAL DOCTRINE* 14, 115, 192 (1988); G. EDWARD WHITE, *THE AMERICAN LEGAL TRADITION: PROFILES OF LEADING AMERICAN JUDGES* 115-122 (1976) (hereafter cited as *THE AMERICAN LEGAL TRADITION*); Joan C. Williams, *The Constitutional Vulnerability of American Local Government: The Politics of City Status in American Law*, 1986 WIS. L. REV. 83, 1485-1514 (hereafter cited as Williams).

15. Of these, Twiss op. cit. n. 14 is perhaps most extreme in describing Cooley's treatise as a "direct counter" to Das Capital. At p. 18. Jacobs op. cit. n. 14, apparently basing his observance wholly on frequency of citation nominated Cooley as "the principal contributor to the cause of constitutional laissez-faire in the era following the Civil War." At p. 27. Those who later saw ratification of the Fourteenth Amendment as a conspiracy to secure property rights against socialism regarded Cooley as one of the conspirators, his treatise being the evidence. See Howard J. Graham, *The Conspiracy Theory of the Fourteenth Amendment*, 47 YALE L.J. 371 (1938). See also JAMES WILLARD HURST, *THE GROWTH OF AMERICAN LAW: THE LAW MAKERS* 338 (1950); PASCHAL op. cit. n. 11.

In two previous articles, I have presented an assessment of Cooley's career. In "*Law as The Common Thoughts of Men*": *The Law Teaching and Judging of Thomas Cooley*,¹⁶ I explored his understanding of the role of law in a democratic society. His views were clearly derived from the Jacksonian democratic persuasion he imbibed as a youth and that continued to inform his understanding of the world around him. He adhered to the Jacksonian Equal Rights doctrine summarized in the slogan: "free schools, free labor, free trade, and free speech."¹⁷ He represented a legal and judicial profession aiming to serve a classless society. In this, he contrasted sharply with his contemporary, Christopher Columbus Langdell, and equally but in quite different ways to his younger counterpart, Oliver Wendell Holmes, Junior. As a teacher, unlike Langdell, he sought to share his democratic values and his professional insights with all who sought them, without pretense and without exclusivity. As a judge, unlike Holmes, he strove to understand legal texts as they would be understood by his fellow citizens and to be a "safe judge," not one given to expressing his personal genius.

In *The Graying of Thomas Cooley: The Jacksonian Roots of Progressivism*,¹⁸ I reviewed Cooley's late career as founding chair of the Interstate Commerce Commission and commentator on legal issues arising in the years after he had subsided as teacher, judge, and scholar. Still a committed Jacksonian, he remained cautious about the role of government and continued to prefer local government as the most democratic kind, but he came at last to the view that the industrial revolution forced a more active role on the national government as the only political instrument large enough to control the predatory conduct of capital.

A thread common to the beliefs of the younger and the older Thomas Cooley was the belief, conventional among the generation who fought the war for American independence, that a republic could be sustained only by vigilant attention to the common welfare of those farmers and workers and their spouses who did the world's work and who bore and raised the next generation of loyal citizens willing to make sacrifices for the common good. Young Cooley thought that farmers and artisans were better able to take care of themselves if the government seldom intervened in their lives. Older Cooley reluctantly concluded that "arrogant wealth" could not be trusted to take proper account of the common welfare, and that industrial workers were unable to protect themselves without the help of government. In this limited sense, he was among the first American Progressives.

My purpose in this article is to confirm this view of Cooley as a

16. Paul D. Carrington, "*Law as The Common Thoughts of Men*": *The Law Teaching and Judging of Thomas Cooley*, 49 STAN. L. REV. 495 (1996).

17. WILLIAM LEGGETT, A COLLECTION OF THE POLITICAL WRITINGS OF WILLIAM LEGGETT 271-72 (Theodore Sedgwick ed. New York, 1840).

18. This article will be published in the next issue of the Iowa Law Review as: *Law and Economics in the Creation of Federal Administrative Law: Thomas Cooley, Village Elder to the Republic*.

forerunner of Progressives by an examination of his scholarship in the field of constitutional law. It was his scholarship, particularly *Constitutional Limitations*, that brought him into disfavor in this century. I here seek to rehabilitate his reputation as an uncommonly wise and humane citizen by reading his scholarship as the product of the time and place in which it was written. So read, Cooley's scholarship was conventional in the values informing its interpretations, which is precisely what Cooley intended it to be. Even as a prodigious scholar, Cooley was a modest man. While he believed that law can be prudently modified only by gentle stages, it was not his purpose to keep the world just as he knew it, and he opposed constitutional interpretation serving to repress change responsive to the natural evolution in "the common thoughts of men" as their thinking is informed by the march of events. He did not presume to write for the ages, or even for the twentieth century.

I hope that consideration of Cooley's ill fate might help to inform debate on other issues involving interpretation of legal texts written at distant times and places. There may be abroad in the land an intellectual infirmity resistant to such contextual reading. It may be particularly fashionable to discredit our antecedents in American law and politics by taking their utterances out of context in order stolidly to apply them to very different circumstances arising in our own time, thereby to show the malevolence of the past.¹⁹ This form of political correctness can be denoted as intergenerational chauvinism; it is a mindset that ignores the sequence of the centuries, that forgets that the options open to those who lived in the nineteenth century were limited to those left behind by persons who lived in the eighteenth century.

To understand Cooley and the reasons for his high repute, it is necessary to understand what he was trying to do as a legal writer and how his efforts were informed by the world around him. While afflicted with normal human weakness and therefore vulnerable to the attractions of instrumental interpretation of legal texts, Cooley strove to resist those attractions and to be a "safe" writer, much as he strove to be a "safe" judge. In the Preface to the *Taxation* treatise, he explained his purpose:

The preparation of any treatise on taxation necessarily involves the presentation of disputed points, and the expression of opinions upon them. This has been done in the following pages. It has not been the purpose, however, to take any positions which it was not believed the authorities would justify; and if this has been done in any instance, the references which are made to authorities will doubtless enable the reader to detect the error.²⁰...

In some other legal cultures, especially those based on Roman traditions, text-writers have long assumed a larger responsibility to guide judges to principles and results deemed most desirable by the text-writers.²¹ That tradition can be found alive and well in modern and post-

19. See JOHN R. SEARLE, *THE CONSTRUCTION OF SOCIAL REALITY* (1995).

20. *Taxation* op. cit. n. 2 at iv. See also his Editor's Preface to *Story* op. cit. n. 4 at v-vi.

21. See generally, JOHN P. DAWSON, *THE ORACLES OF THE LAW* (1968).

modern legal scholarship, which American judges seldom read, for the reason that they are under no professional obligation to regard academic authority. Cooley, unlike many moderns and post-moderns, accepted the subordinate status of a "secondary" authority; his words were written to have influence only to the extent that they accurately reflected the judgments of those having "primary" authority, i.e., sitting judges.²² An error not uncommon among those reviewing legal texts from a distance in time is to assume that the writer was recording his personal views of what the law ought to be, i.e., that his purpose in writing was largely instrumental. As a "safe" or conventional man of his time, Cooley must generally have shared the values and the impulses of the judges whose opinions he synthesized in his texts. But he wrote chiefly to assist his fellow judges in discerning patterns in their collective work, not to persuade them, and it was because they and other readers could detect his integrity and self-discipline in this respect that he was held in such esteem by his contemporaries. When Cooley reported the law in his texts, he was generally describing the actual conduct of judges and his report was therefore generally an accurate account of what other judges would do with like cases, at least in the near future.

II. CONSTITUTIONAL LIMITATIONS

In 1868, Cooley published *Constitutional Limitations*.²³ It was the text of his lectures to law students; he modestly supposed that it might be of some use to clerks and minor officials.²⁴ He was astonished when it was quickly recognized as a masterpiece of its kind.²⁵ Lawrence Friedman has acknowledged it to be the most important law book "for its own generation."²⁶ Andrew McLaughlin went further, depicting the work as "the chiefest American law book."²⁷ The reviewer of the second edition for the most eminent legal periodical of the day was Holmes; he spoke the judgment of the profession:

22. On the marginal influence of academic literature on American law, see generally Paul D. Carrington, *Butterfly Effects: The Possibilities of Law Teaching in a Democracy*, 41 DUKE L. J. 741, 795-805 (1992). See also A. W. B. Simpson, *The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature*, 48 U. CHI. L. REV. 632 (1981); Edward L. Rubin, *The Practice and Discourse of Legal Scholarship*, 86 MICH. L. REV. 1835 (1988).

23. *Constitutional Limitations* op. cit. n. 1.

24. Henry Wade Rogers, Unpublished Biography of Thomas McIntyre Cooley in Rogers Papers, Bentley Library, University of Michigan (quoting Judge Graves).

25. It was "so far the best on the subject that little resort is had of late to any other." Note, Cooley's *Constitutional Law*, 21 ALBANY L. J. 328 (1881).

26. LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 545 (1973).

27. Andrew McLaughlin, Thomas McIntyre Cooley, 4 *Dictionary of American Biography* 392 (Alan Johnson & Dumas Malone eds., 1930); see also Harry Burns Hutchins, Thomas McIntyre Cooley, 7 *Great American Lawyers* 429, 472-73 (William Draper Lewis ed., 1909).

We have made a great deal of use of this book and have carefully compared the text with the authorities in many places. We consider it a very laborious, clear, and valuable work.²⁸

A reviewer of the fourth edition appears to have expressed the opinion prevailing still later when he said that

It is impossible to exaggerate its merits. It is an ideal treatise, and not only a standard authority, but almost exclusively sovereign in its sphere. It is cited in every argument and opinion on the subjects of which it treats, and not only is the book authoritative as a digest of the law, but its author's opinions are regarded as almost conclusive.²⁹

Constitutional Limitations was also necessarily a political tract, but its politics were mostly a politics of first principles, emphasizing the linkage between reported judicial decisions and the core of the national political culture embodied in the constitutional texts they were enforcing. Perhaps the book played a minor role in imprinting on American culture the prevailing ideas that constitutions limit government and are thus law as well as politics.³⁰ The political reality to which he called attention was that state supreme courts had been, at least since the decision of the Supreme Court in *Marbury v. Madison*,³¹ invalidating state legislation found to be in violation of their state constitutions. Because those constitutions shared many common provisions, there were themes to be discerned in the cases interpreting them. Such themes provided the substance of *Constitutional Limitations*.

Although cautious in its representations, Cooley's work was nevertheless intellectually ambitious. It revealed close study of the Constitution of the United States, and equally close study of the constitutions of many states as well. In its comparative dimension, it resembled Francis Lieber's *On Civil Liberty and Self-Government*,³² to which numerous references were made. He contrasted the enumerated and more limited powers of Congress with those of state legislatures sharing with the British Parliament absolute power subject only to those constraints explicitly imposed upon them by constitutional texts. He was chiefly concerned with state constitutions because, at the time he wrote, these were the source of most limitations on the powers of state legislatures, who, in turn, were the source of most important legislation. He was not, in 1868, writing about the Fourteenth Amendment to the Constitution of the United States, being ratified while he wrote.³³

Cooley acknowledged in the preface that he wrote "in full sympathy

28. 6 AM. L. REV. 141, 142 (1871).

29. Book Note, 27 ALB. L. REV. 300 (1883).

30. J. WILLARD HURST, THE GROWTH OF AMERICAN LAW: THE LAW MAKERS 203 (1950).

31. 1 Cranch. 137 (1803).

32. (1853).

33. Cooley did write a brief text on the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution of the United States as a supplement to Story op. cit. n. 4.

with all those restraints which the caution of the fathers has imposed upon the exercise of the powers of government..."³⁴ Hostile twentieth century readers have attached significance to that comment as evidence of a desire on Cooley's part to manipulate his judicial readers in favor of weak government.³⁵ The constitutions of the states about which he chiefly wrote had seldom been invoked to constrain legislators striving to restrain predatory capitalists. Constitutional law was not then in play to shield industry from progressive legislation. He was therefore affirming nothing more than that he accepted the premise of *Marbury v. Madison*, that the government and its officers are bound by the law. So far as appears, no contemporary of Cooley read the prefatory comment as a revelation of any political partisanship.

In an early chapter, Cooley dealt with problems of construction and interpretation,³⁶ summarizing some of the analysis supplied in earlier works by Francis Lieber³⁷ and Theodore Sedgwick.³⁸ With Lieber, he distinguished construction from interpretation,³⁹ and offered maxims to be employed in the performance of those judicial tasks.⁴⁰ These were for the most part cautions against self-aggrandizement. He quoted as representative the statements of Chief Justice Bronson of New York:

It is highly probable that inconvenience will result from following the Constitution as it is written. But that consideration can have no force with me. It is not for us, but for those who make the instrument, to supply its defects.⁴¹

Although not denying, as he had said, that "some things are too plain to be written,"⁴² he insisted that there is no principle of natural law or "spirit" in a constitution to justify extravagant constructions not founded in any

34. Constitutional Limitations op. cit. n. 1 at iv.

35. Jacobs op. cit. n. 14; Max Lerner, *The Supreme Court and American Capitalism*, 42 YALE L. J. 668, 692 (1933) (hereafter cited as Lerner).

36. Constitutional Limitations op. cit. n. 1 at 38-84.

37. LEGAL AND POLITICAL HERMENEUTICS (2d ed, 1838). See also the reference in Constitutional Limitations op. cit. n. 1 at 44 n. 1 to Francis Lieber, On Civil Liberty and Self Government (1852).

38. A Treatise on the Rules Which Govern the Interpretation and Application of Statutory and Constitutional Law (1857). Sedgwick was a fellow adherent of Equal Rights doctrine. His father was the author of PUBLIC AND PRIVATE ECONOMY (3 vols., 1836-39), a work acclaimed by Jacksonians as perhaps the best expression of their dogma. Jessica Hill Bridenbaugh, Theodore Sedgwick, 16 Dictionary of American Biography 551 (Dumas Malone ed., 1935). Stephen Field was his research assistant while Field was a student at Williams. Carl Brent Swisher, Stephen J. Field, Craftsman of the Law 16-17 (1930). The son attended Columbia and practice law in New York City, where he was active in politics with David Dudley Field, notably in the Constitutional Convention of 1846 which abolished the apprenticeship requirements for admission to the bar. Earl L. W. Heck, Theodore Sedgwick, 16 Dictionary of American Biography 551 (Dumas Malone ed., 1935). Sedgwick's treatise was revived in a posthumous edition prepared by John Norton Pomeroy in 1874.

39. Constitutional Limitations op. cit. n. 1 at 38 n. 1.

40. E.g., "Give effect to the whole instrument." Constitutional Limitations op. cit. n. 1 at 57-59.

41. Constitutional Limitations op. cit. n. 1 at 71, n. 2.

42. *People v. Hurlbut*, 24 Mich 44, 107 (1871).

text set forth in the instrument;⁴³ for this abnegation of natural law as constitutional law, he cited abundant authority.⁴⁴ His tenor is captured in his treatment of constitutional doubt:

But when all legitimate lights for ascertaining the meaning of the Constitution have been made use of, it may still happen that the construction remains in doubt. In such a case, it seems clear that every one called upon to act where, in his opinion, the proposed action would be of doubtful constitutionality, is bound upon that doubt alone to abstain from acting. Whoever derives power from the Constitution to perform any public function, is disloyal to that instrument, and grossly derelict in duty, if he does that which he is not reasonably satisfied the Constitution permits. Whether the power be legislative, executive, or *judicial*, there is manifest disregard of constitutional and moral obligation by one who, having taken and oath to observe that instrument, takes part in an action which he cannot say he believes to be no violation of its provisions. ...⁴⁵ [emphasis supplied]

Cooley also devoted a lengthy chapter to “the circumstances under which a legislative enactment may be declared unconstitutional,”⁴⁶ again emphasizing throughout the chapter the importance of judicial self-restraint. He found no occasion to discuss *Dred Scott*,⁴⁷ but his contemporary readers must surely have had that decision in mind when considering his injunction against judicial overreaching. He observed that courts were prudently disinclined to proclaim constitutional limitations unless required to do so by a case presented to them for decision. He identified as established several principles later elaborated in the judicial opinions of Justice Brandeis, a later practitioner of judicial self-restraint.⁴⁸ A second time, he emphasized that legislation cannot be invalid merely because it offends “the spirit” but not the text of a constitution⁴⁹ and that judicial doubts must be resolved in favor of sustaining legislation of questionable validity.⁵⁰

43. But see Stephen A. Siegel, *Historism in Late Nineteenth Century Constitutional Thought*, 1990 WIS. L. REV. 1431, 1488-1514. Professor Siegel finds threads of natural law in Cooley's adherence to a relativist and historical approach to constitutions, while conceding that his “historism” might be viewed as “an ideological mask” concealing his repressive purposes. While people do act from undisclosed motives and from instincts unrecognized even by themselves, it seems questionable whether a person such as Cooley who disavowed belief in natural law can be usefully said to have embraced it.

44. Constitutional Limitations op. cit. n. 1 at 73.

45. Constitutional Limitations op. cit. n. 1 at 73-74. Although Cooley favored federal antitrust legislation, he would presumably have disfavored the decision of its draftsmen to extend the law without limits, leaving the courts to establish in constitutional litigation the parameters of its application. ALBERT H. WALKER, *HISTORY OF THE SHERMAN LAW OF THE UNITED STATES OF AMERICA* 12 (New York 1910).

46. Constitutional Limitations op. cit. n. 1 at 159-188.

47. *Scott v. Sandford*, 19 How. 393 (1857).

48. Compare, for example, *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288 (1936).

49. Constitutional Limitations op. cit. n. 1 at 169-172.

50. Citing more than a score of cases from as many different states and quoting Justice Lemuel Shaw of the Supreme Judicial Court of Massachusetts. Constitutional Limitations op. cit. n. 1 at 182.

This part of the treatise was the forebear of a celebrated article published a quarter century later by James Bradley Thayer.⁵¹ While they wrote at different times and in different contexts, and there may have been significant differences of degree between them, Cooley and Thayer both expressed a widely shared judgment of the American judiciary of the 19th century,⁵² for them tested and proved by the counterexample of *Dred Scott*, that courts should venture to employ their constitutional powers only when on solid ground in the text and in the moral precepts of the national political culture.⁵³ For sharing in this observation of reality, Thayer, too, has been identified as an uncaring reactionary,⁵⁴ an identification, like that of Cooley, based on little evidence,⁵⁵ and

51. Thayer's oft-quoted counsel was that a court can invalidate legislation only when those who have the right to make laws have not merely made a mistake, but have made a very clear one - so clear that it is not open to rational question. . . . This rule recognizes that, having regard to the great, complex, ever-unfolding exigencies of government, much which will seem unconstitutional to one man, or body of men, may reasonably not seem so to another; that the constitution often admits of different interpretations; that there is often a range of choice and judgment; that in such cases the constitution does not impose upon the legislature any one specific opinion, but leaves open this range of choice: that whatever choice is rational is constitutional.

The Origin and Scope of the American Doctrine of Constitutional Law, 7 HARV. L. REV. 129, 140 (1893) (hereafter cited as Thayer). This "clear error" test seems to go a bit further than Cooley ever did in his advocacy of judicial restraint. For comment on this aspect of Thayer's doctrine, see Robert F. Nagel, *Name-Calling and The Clear Error Rule*, 88 N.W. UNIV. L. REV. 193 (1993). For another statement by Cooley on the limits of constitutionalism as a political tool, see his address to the North Dakota Constitutional Convention on July 18, 1889, quoted in Alan R. Jones, Thomas M. Cooley and the Michigan Supreme Court: 1865-1885, 10 AM. J. LEG. HIST. 97, 121 (1966).

52. Cf. JOSEPH STORY, 1 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES x (1833).

A constitution of government is addressed to the common sense of the people and never was designed for trials of logical skills or visionary speculation.

53. Of the two, Cooley was the more influential with contemporaries. He was senior to Thayer, Thayer expressed admiration for Constitutional Limitations and required his students to read Cooley's text for students, *The General Principles of Constitutional Law in the United States of America* (1880) (hereafter cited as *Principles*). Jones op. cit. n.14 at 247. Cooley likewise expressed agreement with Thayer's 1893 lecture. On the influence of Thayer on a trio of Justices, see Wallace Mendelson, *The Influence of James B. Thayer upon the Work of Holmes, Brandeis, and Frankfurter*, 31 VAND. L. REV. 71 (1978).

54. Mark Tushnet, *Thayer's Target: Judicial Review or Democracy?* 88 N.W. UNIV. L. REV. 9 (1993) (hereafter cited as Tushnet). Tushnet infers a secret (perhaps even to himself?) motive of Thayer to rouse political opposition in legislatures to social reform legislation. Tushnet's is the first substantial paper in a symposium that includes contributions by two dozen distinguished constitutional scholars commenting on Thayer's 1893 essay. Tushnet's is one among many that seem chiefly preoccupied with the task of characterizing Thayer's politics: just how conservative was he? There are, I cheer, a number of other papers that seek to evaluate Thayer's wisdom or unwisdom on its own merits without psychologizing him. E.g., Ronald J. Allen, *Constitutional Adjudication, The Demands of Knowledge, and Epistemological Modesty*, 88 N.W. UNIV. L. REV. 436 (1993).

55. Thomas C. Grey, *Thayer's Doctrine: Notes on Its Origins, Scope, and Present Implications*, 88 N.W. UNIV. L. REV. 28 (1993) (hereafter cited as Grey); G. Edward White, *Revisiting James Bradley Thayer*, 88 N.W. UNIV. L. REV. 48 (1993).

inaccurate.⁵⁶ But even as late as Thayer's time, there was no competing view: no one defended *Dred Scott* as an appropriate exercise of judicial power, and no one contended that courts could responsibly employ their constitutional powers to correct apparent oversights or even perceived injustices in the constitutions they were charged to enforce.⁵⁷

Many of the state constitutions of which Cooley wrote were readily and often amended. Indeed, New York in 1846 and Michigan in 1850, and other states as well, had entirely replaced their constitutions. The relative difficulty of amending the federal Constitution could affect the degree of judicial self-restraint appropriate to its construction. One might, for example, approve a decision such as *Roe v. Wade*⁵⁸ yet disapprove the same interpretation of the more readily amendable constitutions of New York or Michigan. The appropriate degree of restraint might also be reasonably affected by the terms of employment of the particular court; judges subject to re-election might be thought to have different obligations than those enjoying tenure for "good behavior."⁵⁹ Thus, one might disapprove the decision of the Supreme Court of the United States in *Roe* and yet believe it would be appropriate for an elected court such as most of which Cooley wrote.

Congruent with his view on the modest political role of constitutional adjudication was Cooley's advice to draftsmen of state constitutions. His advice was to limit length and omit detail in order to prevent abuses of judicial power resulting from overenforcement of constitutions to invalidate laws deemed needful by state legislatures.⁶⁰ He advised the North Dakota Convention in 1889:

[R]emember that times change, that men change, that new things are invented, new devices, new schemes, new plans, new uses of corporate power. . . . Take care to put proper instructions upon [the legislature] but at the same time leave what properly belongs in the field of legislation to the legislature of the future.⁶¹

56. Thayer was active in several political causes separating him from hardened reaction. He was especially prominent in efforts to secure justice and protection for Native American; to that end, he addressed his concerns to Congress as a lobbyist. For a brief account of his activities, see Paul D. Carrington, *Hail! Langdell!*, 20 J. LAW & SOCIAL INQUIRY 691, 719 (1995). One may find in his concerns for Native Americans and Filipinos a measure of patronization, see Jay Hook, *A Brief Life of James Bradley Thayer*, 88 N.W. UNIV. L. REV. 1, 7 (1993), but if paternalism is a badge of reaction, then the New Dealers must also qualify for that label. Thayer also actively opposed the War with Spain as an unwelcome venture into imperialism. *Our New Possessions*, 12 HARV. L. REV. 464, 465-66 (1899).

57. Cf. Robert H. Bork, *Styles in Constitutional Theory*, 1984 YEARBOOK OF THE SUPREME COURT HISTORICAL SOCIETY 53, 54 observing that Cooley took the theory of limited judicial responsibility for granted, there being "no opposing school to rebut."

58. 410 U.S. 113 (1973). I cite this case as perhaps the most aggressive use of the Court's power in the 20th century.

59. These reasons may account for such differences as existed between Cooley and Thayer. Cooley was chiefly concerned with the enforcement of state constitutions, Thayer only with the federal. See Thayer op. cit. n. 51. See Tushnet op. cit. n. 54 at 27.

60. Comparative Merits of Written and Prescriptive Constitutions, Proceedings of the 12th Annual Meeting of the New York State Bar Association 47 (New York 1889).

61. Quoted by Jones op. cit. n. 14 at 332.

In a chapter following his treatment of constitutional interpretation and the role of the judiciary, Cooley addressed the constitutional status of local government. As a judge, Cooley was himself in the forefront of those upholding the prerogatives of local government.⁶² As a text-writer, while acknowledging that the powers of municipal corporations depend upon the sufferance of state legislatures,⁶³ he observed that local government in America predated the erection of state government, and that the premise of our constitutions "is one of complete decentralization."⁶⁴ Conceding that the "general disposition of the courts" had been to construe municipal charters strictly,⁶⁵ he affirmed that limited local power and autonomy could be acquired by usage.⁶⁶

In his preference for localism, Cooley followed Lieber, who contended that civil liberty was dependent on active self-government, and that self-government could be best conducted locally.⁶⁷ Lieber emphasized the contrast between "Anglican" institutions localizing political power and "Gallican" institutions that centralized it.⁶⁸ The latter, Lieber observed, tended to be vulnerable to despotism and the loss of civil liberty, while the former tended to resist despotism and thus to secure civil liberty. This observation rested on the belief that citizens who often participate in government are, over time, more likely to respect one another's rights than are those who do not. Local governments, at least in the nineteenth century, seemed to afford more opportunities for participation and to reward those who participated with a greater sense of control over their lives and communities.

Although closer to recognizing Cooley's aims than many who have written about him in this century, Joan Williams mistook his support for

62. E.G., *People v. Hurlbut*, 24 Mich. 44 (1871).

63. *Constitutional Limitations*, op. cit. n. 1 at 192:

... They have no inherent jurisdiction to make laws or adopt regulations of government; they are governments of enumerated powers, acting by a delegated authority; so that while the State legislature may exercise such powers of government coming within the designation of legislative power as are not expressly or impliedly prohibited, the local authorities can exercise those only which are expressly or impliedly conferred ...

The creation of municipal corporations, and the conferring upon them of certain powers and subjecting them to corresponding duties, does not deprive the legislature of the State of that complete control over their citizens which was before possessed. It still has authority to amend their charters, enlarge or diminish their powers, extend their boundaries, consolidate two or more into one, overrule their action whenever it is deemed unwise, impolitic, or unjust, and even abolish them altogether in the legislative discretion.

Cooley wrote decades before the development of constitutional home rule for specified urban areas.

64. *Constitutional Limitations* op. cit. n. 1 at 189.

65. *Constitutional Limitations* op. cit. n. 1 at 195.

66. *Constitutional Limitations* op. cit. n. 1 at 196-197.

67. This is the theme of *Civil Liberty*, op. cit. n. 56.

68. This distinction was also noted by 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA*, chap. 5, quoted by Cooley in *Constitutional Limitations* op. cit. n. 1 at 190, n. 3.

local self-government. She, with others,⁶⁹ contrasted Cooley with John Forrest Dillon, the judge and professor in Iowa who was the author of a respected treatise on *Municipal Corporations*.⁷⁰ She ascribed to Cooley a belief in "inherent local authority" that was denied by Dillon, both as judge⁷¹ and as treatise writer.⁷² Employing the dark arts of deconstruction, she finds Dillon's real purpose to be protection of railroads and industrialists from socialist town governments⁷³ and Cooley's real purpose to be the denial of power to state legislatures, and "only secondarily an attempt to empower localities."⁷⁴ While Williams is not wrong that Cooley mistrusted state legislatures, he also mistrusted local governments, whom he did not suppose would often govern wisely or well. But Cooley found in state constitutions a purpose to diffuse power; he perceived it to be the aim of constitutions to limit the possibilities for catastrophic abuses of power and enlarge the chances that civil liberties would be protected over time.

His treatise is perhaps most suspect in this treatment of local government. Aside from his role as text-writer, he was an early advocate of home rule, a principle embraced by the Progressives of the next generation.⁷⁵ And as member of the Supreme Court of Michigan, he not only interpreted the state constitution as one favoring local authority, but supported his interpretation with words of exceptional passion. Almost breathlessly, he explained:

If this charter of state government we call a constitution were all there was of constitutional command; if the usages, the customs, the maxims, that have sprung

69. E.g., Amasa M. Eaton, *The Right to Local Self-Government*, 13 HARV. L. REV. 441, 470, 638 and 14 HARV. L. REV. 19, 116 (1900); ANWAR SYED, *THE POLITICAL THEORY OF AMERICAN LOCAL GOVERNMENT* 53-75 (1966).

70. William op. cit. n. 14. And see Edwin A. Gere, *Dillon's Rule and the Cooley Doctrine*, 8 J. URBAN HIST. 271 (1982).

71. *Clinton v. Ceder Rapids & Missouri River Railroad*, 24 Iowa 455 (1868).

72. *Treatise on Municipal Corporations* 52 (Chicago, 1872). There is, however, ample support in Cooley's 1868 treatise for the position of Dillon that municipal corporations might in some functions have rights as private corporations, id. 70-94, and also cited *People v. Hurlbut* with approval, e.g., id. at 66 n. 1. If, as it seems, Cooley's politics were very different from Dillon's, their differences are not very visible in their analyses of the cases bearing on the powers of municipal governments. Cooley favored local government and Dillon suspected it, but they read the cases in the same ways. Dillon's treatise, like Cooley's was long and widely cited because it was a complete and accurate account of what was happening.

73. She describes Dillon as "an academic ally of the robber barons of the Gilded Age." Williams op. cit. n. 14 at 90. She infers that his work as a state and then federal judge in Iowa, and as a treatise writer, Dillon was at all times pursuing the main chance of big-time New York practice, an opportunity that came to him in 1878 when he accepted appointment as General Counsel to the Union Pacific Railroad: "He clearly designed his life to join the corporate elite by serving as its spokesman." Id. at 97.

74. Williams op. cit. n. 14 at 149.

75. Lecture I: *The Sentiment of Equality in American Politics*, Johns Hopkins University (1878), unpublished manuscript in Box 1, Cooley Collection, Bentley Library, University of Michigan.

from the habits of life, modes of thought, methods of trying facts by the neighborhood, and mutual responsibility in neighborhood interests, the precepts which have come from the revolutions which overturned tyrannies, the sentiments of manly independence and self-control which impelled our ancestors to summon the local community to redress local evils, instead of relying upon King or legislature at a distance to do so, if a recognition of all these were to be stricken from the body of our constitutional law, a lifeless skeleton might remain, but the living spirit, that which gives force and attraction, which makes it valuable and draws it to the affections of the people, that which distinguishes it from the numberless constitutions, so called, which in Europe have been set up and thrown down in the last one hundred years, many of which in their expressions have seemed equally fair and to possess equal promise with ours, and have only been wanting in support and vitality which these alone can give, this living and breathing spirit, which supplies the interpretation of the words of the written charter, would be utterly lost and gone.⁷⁶

The 1868 chapter on local government prefigured his own 1870 decision in *People v. Salem*⁷⁷ in affirming that local tax revenues must be applied to a public, not a private purpose.⁷⁸ He noted in his usual straightforward style cases authorizing municipal corporations to engage in public works outside their territorial limits and to become stockholders in private corporations, but judged that such cases have “gone to the very limits of constitutional power.” Surely, he speculated, a legislature could not require such a use of local tax revenues. No significant modification of his treatise was made in later editions to reflect his own court’s decision in the *Salem* case,⁷⁹ because he recognized his own decision as outlying the general pattern.

Cooley then devoted a substantial chapter to protections of personal liberty, chiefly rights arising in the enforcement of criminal law. Characteristic is his comment on the right to counsel. After reviewing the shortcoming of English law denying the right, he proclaimed:

With us, it is a universal principle of constitution law that the prisoner shall be allowed a defence by counsel. The humanity of the law has generally provided that, when the prisoner is unable to employ counsel the court may designate some one to defend him, who shall be paid by the government; but when no such provision is made, it is a duty which counsel so designated owes to his profession, to the court engaged in the trial, and to the cause of justice, not to withhold his best exertions in the defence of one who has the double misfortune to be stricken by poverty and accused of crime. No one is at liberty to decline such an appointment, and it is to be hoped that few would be disposed to do so.⁸⁰

Cooley thus stopped short of declaring a constitutional right not then existing, but he foretold a series of twentieth century decisions of the United States Supreme Court that would do so.⁸¹

Following the chapter on the protection of personal liberty was one

76. 24 Mich. at 107.

77. 20 Mich. 452.

78. Constitutional Limitations, op. cit. n. 1 at 211-235.

79. See the fourth edition at p. 260-61 and 289.

80. Constitutional Limitations op. cit. n. 1 at 334. But see his reference to *Webb v. Baird*, 6 Ind. 13, at p. 394. Contrast *Mallard v. United States District Court*, 490 U.S. 296 (1989).

of the protection of property. Cooley opened that chapter with a reference to the Magna Charta and its promise not to impose forfeitures of rights in land; he noted that such royal pledges are not needed here in light of the universality of due process clauses in American constitutions.⁸² He validated with citations the conclusion of Justice Johnson that "due process" is "intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice."⁸³ He was then at pains to distinguish between those vested rights that are entitled to the protections of due process from those interests that are too ephemeral to merit such protection. The distinction he made, it seems fair to say, is not a crisp one to the eye of a late twentieth century reader, entailing as it does further distinctions between property and speculative interests, and between rights and remedies, that are not always readily apparent. Yet it is not certain that the distinction has been greatly clarified in the 118 years since Cooley's publication.⁸⁴

In this setting, Cooley included a section on "Unequal and Partial Legislation" that some later historians supposed he included for the ulterior purpose of lending aid and comfort to rich industrialists exploiting the weaknesses of the poor.⁸⁵ In this section, he relied less on judicial authority. He quoted Locke's preference for "established laws, not to be varied in particular cases, but to have one rule for rich and poor, for the favorite at court and the countryman at plough," and declared it a "maxim in the law, by which may be tested the authority and binding force of legislative enactments."⁸⁶ Oft-quoted was his affirmation that

Equality of rights, privileges, and legal capacities. should be the aim of the law . . . The State, it is to be presumed, has no favors to bestow, and designs to inflict no arbitrary deprivation of rights. Special privileges are obnoxious, and discriminations against persons and classes are still more so, and as a rule of construction are always to be leaned against as probably not contemplated or designed. . . .⁸⁷

This passage is a succinct statement of the idea most famously expressed by President Jackson in his bank veto message.⁸⁸ It is a statement of the position of most American courts of the time, who disfavored as iniqui-

81. *Johnson v. Zerbst*, 304 U.S. 458 (1937); *Gideon v. Wainwright*, 372 U.S. 335 (1962).

82. *Constitutional Limitations* op. cit. n. 1 at 351.

83. *Constitutional Limitations* op. cit. n. 1 at 355, quoting *Bank of Columbia v. Okely*, 4 Wheat. 235 (1819).

84. See, e.g., Laura Underkuffler-Freund, *The Perfidy of Property*, 70 *Tex. L. Rev.* 293 (1995) reviewing Jennifer Nedelsky, *Private Property and The Limits of American Constitutionalism* (1990).

85. *Twiss* op. cit. n. 14 at 18.

86. *Constitutional Limitations* op. cit. n. 1 at 392, quoting Locke on *Civil Government* §142.

87. *Constitutional Limitations* op. cit. n. 1 at 393.

88. JAMES D. RICHARDSON, 2 *COMPILATIONS OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1907* at 590 (1908).

tous the practice of issuing special charters and licenses. It presumed that government intervention would almost certainly serve the interests of the monied class. It was hardly imaginable to Cooley in 1868 that government might be used to restrain the predations of "arrogant wealth," or that his words would be invoked to invalidate legislative efforts to impose such restraints.

Cooley then accepted without pausing to question that legitimating reasons might justify gender distinctions.⁸⁹ Nancy Erickson italicized Cooley's few words on this subject to emphasize their influence in support of legislation protective of women, legislation that she deemed to have been repressive of women.⁹⁰ One of Louis Brandeis's most notable victories was to sustain just such a law,⁹¹ and few if any Americans of either gender in the Progressive era would have questioned Cooley's judgment, or that of other nineteenth century judges who accepted the need for laws protecting women.

Cooley then turned to liberty of speech and of the press,⁹² noting that a counterpart to the First Amendment of the United Constitution existed in every state. The protections, he observed, include the right intemperately to criticize the government and its officers. other topics treated with care, and with exhaustive citation of cases, were religious liberty, the power of taxation and the power of eminent domain.

In a penultimate chapter, Cooley addressed "The Police Power of the States," that is their power to regulate the conduct of citizens. He supported the statement of Chief Justice Shaw of Massachusetts that all property is subject to general regulations necessary to the common good and general welfare, there being no "vested right to do wrong."⁹³ He observed that the courts had extended this limitation to charters and contracts as well.⁹⁴ More than once, he criticized the early *Dartmouth College*⁹⁵ case for its tendency to entrench contract rights so as to forestall legislation needed to prevent antisocial consequences of contract performance. In a footnote in the second edition, he allowed himself to protest that:

It is under the protection of [that] decision that the most enormous and threatening powers in our country have been created; some of the great and wealthy corporations having greater influence in the country at large, and upon the legislation of the country, than the states to which they owe their corporate existence. Every privilege granted or conferred - no matter by what means or by what pretence - being made inviolable by the Constitution, the government is frequently found stripped of its authority in very important particulars, by unwise, careless, or corrupt legislation; and a clause of the Federal Constitution, whose purpose

89. Constitutional Limitations op. cit. n. 1 at 390, 393.

90. *Muller v. Oregon Reconsidered: The Origins of a Sex-Based Doctrine of Liberty of Contract*, 30 J. LABOR HIST. 228, 233 (1989).

91. *Muller v. Oregon*, 208 U.S. 412 (1908).

92. Constitutional Limitations op. cit. n. 1 at 414-466.

93. Constitutional Limitations op. cit. n. 1 at 573.

94. Constitutional Limitations op. cit. n. 1 at 574-580.

95. *Dartmouth College v. Woodward*, 4 Wheat. 518 (1819).

was to preclude the repudiation of debts and just contracts, protects and perpetuates the evil.⁹⁶

While he noted a requirement that police regulations serve the general welfare, not merely private interests, he did not reiterate his earlier comments on the right to equality as a source of restraint on the police power. One could nevertheless infer that legislatures making arbitrary distinctions in the application of the lash of the police power could be restrained if they failed to meet the requirements of equality and impartiality stated in the earlier chapter.

Constitutional Limitations was not only widely admired, it was, as noted, also widely cited. Indeed, the frequency of its citation in decisions that later historians disapproved led them to conclude that his influence was malign.⁹⁷ It has been cited thousands of times by highest state courts and hundreds of times by the Supreme Court of the United States.⁹⁸ Only a few of those references involved matters of interest to the historians who have depicted his work as manipulative.⁹⁹

To some extent, the text he wrote in 1868 would, like the judicial rhetoric he faithfully recorded, take on different meaning with the passage of time and the interposition of new social and political relationships. The industrialization of America proceeded apace¹⁰⁰ as small workshops were replaced by factories, deflation crushed many small businesses, railroads charged rates disadvantageous and even ruinous to some farmers and some businesses, and sometimes to one another, industries ravaged natural resources, patent owners collected royalties on such simple and necessary products as barbed wire, and manufacturers learned to make and sell glitzy products that were ineffective or even harmful to users. Such consequences of industrialization accelerated through the last quarter of the 19th century¹⁰¹ creating many needs for regulation to protect the health and safety of citizens and especially to protect landless workers subjected to working conditions that were dangerous not only to themselves and their families, but also to the public interest, by whatever measure that

96. *Constitutional Limitations* 335 (2d ed., 1871). See also *State Regulation of Corporate Profits*, 137 N. Amer. Rev. 207 (1883) (hereafter cite as *Corporate Profits*). For an elaborate analysis of the relation of the Cooley treatise to the development of the Contract Clause, see James L. Kaimen, *Nineteenth Century Interpretations of the Federal Contract Clause: The Transformation of Vested to Substantive Rights Against the States*, 31 BUFF. L. REV. 381 (1982).

97. See especially Jacobs op. cit. n. 14 at 23-63.

98. See note 9 supra.

99. A sampling of those references tends to confirm that the treatment of the Police Power was not a striking feature of the treatise; many other sections were of equal or greater interest to the Court.

100. See generally CARL DEGLER, *THE AGE OF ECONOMIC REVOLUTION, 1870-1910* (1977).

101. For an account of this process, see DAVID MONTGOMERY, *BEYOND EQUALITY: LABOR AND THE RADICAL REPUBLICANS, 1862-1872* (1967) and DAVID MONTGOMERY, *THE FALL OF THE HOUSE OF LABOR* (1987).

interest might be accounted.

In the decades following publication of *Constitutional Limitations*, many exercises of "the police power" to afford protections of the weak against exploitation by the strong were upheld by courts against constitutional challenges, and the Cooley treatise was cited in support of some of these decisions.¹⁰² On the other hand, there were other important police power cases in which Cooley was not cited by the Court.¹⁰³ The constitutional limitations on the police power became a major political battleground between capitalists and those who sought to regulate them. Moreover, the ratification of the Fourteenth Amendment to the federal Constitution broadened the encounter by providing a new constitutional text from which those seeking to limit legislative power could derive support. In revising his treatise, Cooley faithfully reported these developments, but made no major changes in the structure of his presentation.¹⁰⁴ Perhaps the most important difference between the editions was their increasing girth as more and more citations were added to support and illustrate the text.

Cooley's was not the only secondary authority on the law limiting the police power of the states. Other authors would elaborate on that subject, two of whom bear notice here. Eighteen years after Cooley, Christopher Tiedeman, then at the University of Missouri, published a 600-page account of the limits, both state and federal, on the police power of the states.¹⁰⁵ Tiedeman may in fact have been the social Darwinist¹⁰⁶ that some later historians presumed Cooley to have been. His preface concluded:

If the author succeeds in any measure in his attempt to awaken the public mind to a full appreciation of the power of constitutional limitations to protect private rights against the radical experimentations of social reformers, he will feel that he has been amply requited for his labors in the cause of social order and personal

102. E.g., *Chicago B. & O. R. Co. v. Chicago*, 166 U.S. 226, 236, 239 (1897); *Davidson v. New Orleans*, 96 U.S. 97-99 (1878); *Richmond F. & P.R. Co. v. Richmond*, 96 U.S. 521, 525 (1877); *Boston Beer Co. v. Massachusetts*, 97 U.S. 25, 26 (1877); *Munn v. Illinois* 94 U.S. 113 (1877).

103. E.g., *Slaughterhouse Cases*, 16 Wall. 36 (1873); *Butchers Union v. Crescent City*, 111 U.S. 746 (1883); *Barbier v. Connolly* 110 U.S. 127 (1884); *Yick Wo. v. Hopkins*, 118 U.S. 356 (1886); *Powell v. Pennsylvania*, 127 U.S. 678 (1888).

104. After 1880, Cooley left the work of updating his treatise to others. His last substantial writing on Constitutional Law was the student text, *The General Principles of Constitutional law in the United States of America* (1880).

105. *A Treatise on the Limitations of Police Power in the United States* (1886) (hereafter cited as Tiedeman). Also significant was FRANCIS WHARTON, *COMMENTARIES ON LAW EMBRACING CHAPTERS ON THE NATURE, THE SOURCES, AND THE HISTORY OF LAW, ON INTERNATIONAL LAW, PUBLIC AND PRIVATE, AND ON CONSTITUTIONAL AND STATUTORY LAW* (1884). Herbert Hovenkamp assigns substantial importance to Wharton's work. *The Political Economy of Due Process*, 40 STAN. L. REV. 379, 396 (1988) (hereafter cited as Hovenkamp).

106. See generally RICHARD HOFSTADTER, *SOCIAL DARWINISM IN AMERICAN THOUGHT* (rev. ed., 1955). This work tends to support the view of Hovenkamp that Social Darwinism was "the most overrated of Gilded Age ideologies." Hovenkamp op. cit. n. 105 at 418.

liberty."¹⁰⁷

Unlike Cooley, Tiedeman argued that courts should review legislation to prevent manifest injustice and to assure legislative fidelity to the social contract,¹⁰⁸ but regretfully acknowledged that it was settled American law that a court cannot nullify legislation simply because it conflicts with natural right.¹⁰⁹ Tiedeman, again unlike Cooley, found no need for a section of his work on "unequal" legislation. He repeatedly emphasized, even more strongly than Cooley, the requirement that valid police regulation must have a legitimating public purpose, and cannot rest on legislative impulses that are irrational or intended to serve a private purpose.¹¹⁰

Another eighteen years after the appearance of Tiedeman's book, yet another exhaustive work on the police power appeared.¹¹¹ The 1904 work was by Ernst Freund. A professor at the University of Chicago, Freund's politics were far removed from those of Tiedeman; among his sometime allies were Jane Addams,¹¹² Eugene Debs,¹¹³ Clarence Darrow,¹¹⁴ and Louis Brandeis.¹¹⁵ With Brandeis, Freund would be active in the movement to reform labor laws to protect workers with too little bargaining power to secure decent pay and working conditions.¹¹⁶ Freund's work reported many recent developments, acknowledging that most of the law on the limits of the police power had developed since the publication of

107. Tiedeman op. cit. n. 105 at vii-viii. The author expresses the Spencerian view that "[l]aw can never create social forces." Id. at 571. He also explains the subordination of married women as a right made by might. Id. 545. Cf. Statics op. cit. n. 12 at 188 (1892). Spencer's most influential work was *STUDY OF SOCIOLOGY* (London 1870).

108. Tiedeman op. cit. n. 105 at 6.

109. Tiedeman op. cit. n. 105 at 7.

110. Tiedeman may have been a bit quicker than Cooley to commend judicial decisions invalidating legislation as irrational. If so, he was sometimes, by the conventional reckoning of our time, correct: he argued that miscegenation laws are irrational and a denial of due process. "But the prejudice of race has been too strong even in the judicial minds of the contrary to secure for these laws a scientific considerations, and hence they have been repeatedly held to be constitutional." Tiedeman op. cit. n. 105 at 537.

111. ERNST FREUND, *THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS* (1904) (hereafter cited as FREUND).

112. *The first Social Worker*. Albert J. Kennedy, Jane Addams, 21 *Dictionary of American Biography* 10 (Harris E. Starr ed., 1944).

113. The first President of the American Federation of Labor and the Socialist candidate for President of the United States in 1912 who polled almost a million votes. W.J. Ghent, Eugene Victor Debs, 5 *Dictionary of American Biography* 183 (Allen Johnson & Dumas Malone eds., 1930).

114. The Chicago lawyer who won fame defending labor organizers and others accused of crime. For a biography, see IRVING STONE, *CLARENCE DARROW FOR THE DEFENSE* (1977).

115. Later Justice Brandeis, whose nomination by President Wilson was stoutly resisted by Republicans who alleged Brandeis to be a radical. His most recent biography is STEPHEN W. BASKERVILLE, *LAWS AND LIMITATIONS: AN INTELLECTUAL PORTRAIT OF LOUIS DEMBITZ BRANDEIS* (1994).

116. A brief biography is OSCAR KRAINES, *THE WORLD AND IDEAS OF ERNST FREUND* (1974).

Cooley's first edition and was even yet in a formative stage.¹¹⁷ Freund, more than Cooley, was preoccupied with the principle of equality, devoting the final third part of his work to it.¹¹⁸ He accepted the doctrine stated by Cooley forbidding "class legislation" and devoted his efforts to analyzing what that broadly-stated restraint might mean in particular circumstances. That Freund, a lawyer unmistakably committed to the welfare of workers, found the law to be much as Cooley had described it further confirms the integrity of Cooley's work.

III. COMMENTARIES ON THE U.S. CONSTITUTION

Constitutional Limitations was chiefly a work on state constitutions and was written for the purpose of assisting state courts and lawyers appearing before them. Cooley did, however, write on the federal Constitution. In 1873, five years after publication of *Constitutional Limitations*, he produced an edition of Joseph's Story's *Commentaries on the Constitution of the United States*. Cooley's was the fourth edition of a work first published in 1833.¹¹⁹ It was then the one comprehensive book on the federal Constitution and was widely used for access to precedents interpreting that instrument. As editor, Cooley added references to cases decided in the previous fifteen years, thus bringing the work up to date. While the Story treatise remained in use and went through several later editions, it has seldom if ever been suggested that Cooley's editing of Story's work reflected a purpose to assure constitutional protections of laissez-faire economic policies. But examination of it does inform our understanding of who Cooley was and what he was trying to do.

Most of interest, Cooley added three chapters to Story's work, one each for the Thirteenth, Fourteenth, and Fifteenth Amendments. Explaining these additions, he wrote:

In preparing them, the editor has not been ambitious to enter upon original discussions, or to advance peculiar views; and he has contented himself with a brief commentary on the provisions and purposes of the amendments, aiming as far as possible to keep in harmony with the opinions and sentiments under the inspiration of which they were accepted as ratified in the several States.¹²⁰

Indeed there was little that was "original" or "peculiar" in the three chapters; in this, they further illustrate his modesty and self-restraint as a legal writer. On the other hand, they reveal Cooley's support for the aims of those amendments, and illuminate his understanding of the relationship between the state constitutional provisions of which he wrote in *Constitutional Limitations* and the provisions of the new Fourteenth Amendment.

117. FREUND op. cit. n. 111 at v.

118. FREUND op. cit. n. 111 at 626-755.

119. All editions were published by Little, Brown in Boston.

120. 1 STORY op. cit. n. 4 at v.

With respect to the Thirteenth Amendment, Cooley was very brief and gloating:

Nothing by way of comment can make its provisions plainer; the boast of English lawyers and philanthropists after *Somerville's* case¹²¹ that "a slave cannot breathe in Britain, but the moment he sets foot upon her soil he becomes free," is equally or even more strictly true in America.¹²²

With respect to the Fifteenth Amendment, Cooley explained that continued discrimination at the polls perpetuated a feeling of degradation and put blacks "at a serious disadvantage" in competition with others. A penultimate passage was so optimistic that it merits quoting at length:

This . . . amendment crowns the edifice of national liberty. Freedom is no longer sectional or partial. There are no longer privileged classes; the laws have ceased to be invidious, and all classes of citizens who are to be governed by them are admitted also to participate in their administration.

The question may indeed be raised, whether it be not possible that we have plunged into new dangers in laying thus broadly the basis of responsible citizenship. There are those who foresee only evil, and who prophesy only calamity. But evil is always prophesied when concession is made to democracy; when kings are set aside, when hereditary privileges are abolished or restricted, when the press is unmuzzled, when the conscience is set free. It was prophesied in England when toleration was extended to dissenters from the established church, and again when Catholics were emancipated, and again when political rights were extended to the Jews. Every step in that country towards making the parliament truly representative body of the whole nation, every disenfranchisement of decayed or corrupt boroughs, and every extension of the franchise to the people, has been earnestly opposed as fraught with danger to the state. Every step in America in the same direction has met with the like opposition. The rulers, whether they be kings or lords or privileged classes, always believe they rule by right divine. Power is safe in their hands, but it would be dangerous in the hands of the people at large: this is the assumption always where the demands of new classes for a voice in the government are to be resisted. The American people have assumed that that which is most just is also the wisest and safest, and they trust to time and experience to justify their confidence. It is beyond question that many unfit persons will demand and exercise the right of suffrage, but no test that could be prescribed—whether of education, property, experience, race or color—could be completely effectual in separating out the fit from the unfit, the virtuous from the vicious, the patriotic and public-spirited from the selfish, mercenary and mean.¹²³

Cooley's account of the Fourteenth Amendment was, of course, more pertinent to the evolution of limitations on the states' police power, and therefore bears closer scrutiny here. It was written in 1872 when Reconstruction of the South was in full flower.¹²⁴ Reflecting his pacific impulses, it begins with courtesies to the "great, brave but unsuccessful army now broken up and remanded to civil life . . ."¹²⁵ He affirmed that

121. [Cooley's footnote:] 20 State Trials 1; Lofft 18, Broom, Const. Law. 105.

122. 2 STORY op. cit. n. 4 at 645.

123. 2 STORY op. cit. n. 4 at 689-690.

124. See generally ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877 (1988).

125. 2 STORY op. cit. n. 4 at 648-649.

the Amendment responded to the need to protect the rights of freemen in the highly disturbed conditions then existing in the formerly Confederate states and also to the desire of those supporting the Union clearly to impose on citizens in Southern states the duty to share in repaying the nation's war debts.¹²⁶ In protecting the rights of freemen, the Amendment explicitly overruled *Dred Scott*, the widely reviled antebellum decision denying the constitutional status of citizenship to such persons.¹²⁷

Cooley then examined separately the several operative clauses of the Amendment. First, conceding that the "privileges or immunities" that states are forbidden to abridge cannot be satisfactorily enumerated, he explained the aim of that clause as an assurance to freemen that they would be protected by "equal and impartial laws which govern the whole community."¹²⁸ He emphasized that the privileges to be protected are those of the citizens of the United States.¹²⁹ In this assertion, he drew on a widely accepted opinion of Justice Bushrod Washington in an 1823 case interpreting the phrase "privileges and immunities" that citizens are assured by Article IV of the Constitution.¹³⁰ Possibly the language of the Amendment could have sustained a broader interpretation of protected privileges. But, as the decisions of Justice Field demonstrate, such an interpretation would have been employed to the substantial disadvantage of states seeking to regulate harsh working conditions and other unwelcome consequences of industrialization.

As Phillip Paludan observed,¹³¹ in this restrained reading of the Privileges and Immunities Clause, Cooley regarded the Amendment more as a promise kept than as a promise made. Citing Story and Lieber, he quoted at length from the abolitionist Senator Charles Sumner's, assessment of the aim of the Fourteenth Amendment:

Here is the great charter of every human being drawing vital breath upon this soil, whatever may be his condition and whoever may be his parents. He may be poor, weak, humble, or black . . . but before the Constitution all these distinctions disappear . . . he is a MAN, the equal of all his fellow-men. He is one of the children of the state, which, like an impartial parent, regards all its offspring with

126. 2 STORY op. cit. n. 4 at 649. See Section 4 of the Fourteenth Amendment.

127. 2 STORY op. cit. n. 4 at 653-656.

128. 2 STORY op. cit. n. 4 at 657.

129. 2 STORY op. cit. n. 4 at 658.

130. Section 2 of Article IV as ratified in 1789 provides that "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." In *Corfield v. Coryell*, 6 Fed. Cas. 546 (1823), Justice Washington held that this clause did not preclude a state from limiting fishing rights in its streams to its own citizens, there being no federal right to fish. The Court, not citing Cooley, adopted the same interpretation in *The Slaughterhouse Cases*, 16 Wall. 36, 74 (1873). In his opinion in that case, Justice Miller enumerated some federal privileges, such as the right to travel to the seat of the government. Phillip Paludan complains that the list of privileges is too "miniscule." *Law and The Failure of Reconstruction: The Case of Thomas Cooley*, 33 J. HIST. OF IDEAS 597 (1979) (hereafter cited as Paludan).

131. Paludan op. cit. n. 130 at 608.

equal care. . . . The state, imitating the divine justice, is no respecter of persons.¹³²

Second, turning to the prohibition against deprivations without due process of law, Cooley first noted the purpose of protecting freemen from paternalistic deprivations ostensibly made for their own protection. Such, it was feared, would "keep the colored race for a time at least in [a] condition of pupilage and dependence" and perpetuating their degradation.¹³³ He observed that due process of law imposed on the states the duty to protect all citizens against arbitrary procedures or arbitrary legislative enactments. The latter obligation he likened to that imposed on the English crown by the 29th chapter of the Magna Charta: there must be one "law of the land," the same for all.¹³⁴ Thus, he concluded that the Due Process Clause merely federalized what was already the law of all states, commissioning the federal courts to enforce those pre-existing public duties.¹³⁵ But, he cautioned:

All the property and vested rights of individuals are subject to such regulations of police as the legislature may establish with a view to protect the community and its several members against such use or employment thereof as would be injurious to society or unjust toward other individuals.¹³⁶

As an example of a proper use of the police power, he affirmed the authority of the states to prohibit the sale of intoxicating liquors, and even to destroy such beverages if kept for sale in violation of the law.¹³⁷ The author of these words was not a champion of laissez-faire, but a Prohibitionist¹³⁸ and a harbinger of the Progressivism of the early 20th century.

Cooley's explanation that the Due Process Clause of the Fourteenth Amendment was not a change of substance but merely provided a new federal enforcement mechanism for pre-existing state constitutional law was ratified by the Supreme Court.¹³⁹ It was also supported by Ernst Freund when in 1904 he described the principle of substantive due process in terms redolent of antebellum state law reported in 1868 by Cooley. Freund stated the national law to be that

Where a restraint is confined to a special class of acts or occupations, that class must present the danger dealt with in a more marked and uniform degree than the

132. **2 Story op. cit. n. 4 at 657-658, quoting 2 Speeches of Charles Sumner 341 (Edward L. Pierce ed., 1877). Sumner was, however, disappointed in the text of the Fourteenth Amendment. DAVID H. DONALD, *CHARLES SUMNER AND THE RIGHTS OF MAN* 262-264 (1967)).

133. 2 STORY op. cit. n. 4 at 661-662.

134. 2 STORY op. cit. n. 4 at 662-663.

135. 2 STORY op. cit. n. 4 at 667.

136. 2 STORY op. cit. n. 4 at 671.

137. 2 STORY op. cit. n. 4 at 672.

138. Cooley ran on the Prohibition Party ticket as well as the Republican ticket in his judicial campaign of 1885. Jones op. cit. n. 14 at 280 n. 107.

139. This was the premise of both majority and dissenting opinions in the *Slaughterhouse Cases*, 83 U.S. 36 (1873).

classes omitted, and where the restraint is general, with certain exceptions, the excepted classes must either be entirely free from the danger, or the exception must tend to reduce the general danger, or a distinct and legitimate public policy must favor the toleration of the evil under circumstances where it is outweighed by great benefits.¹⁴⁰

Third, to Cooley the provision requiring the states to assure Equal Protect of the Law “would not seem to call for much remark.”¹⁴¹ He regarded this clause merely as a formal declaration of a principle pervading the whole “spirit” of the Constitution, that all are equal before the law,¹⁴² the central conviction of Jacksonian democrats. Here he cited the opinion of Chief Justice Shaw in *Roberts v. Boston*,¹⁴³ the 1850 Massachusetts decision declining to desegregate public school and observed:

And now that it has become a settled rule of constitutional law that color or race is no badge of inferiority, we doubt if any distinction whatever either in right or in privilege, which has color or race for its sole basis, can either be established in the law or enforced where it had previously been established.¹⁴⁴

Cooley thus failed to foresee the revival of black codes in the South, an event that did not begin to occur until after 1875 as Reconstruction collapsed and the South was “redeemed” by its former ruling class.¹⁴⁵

As a judge, Cooley was himself responsible for the desegregation of the Detroit Public Schools. In 1869, his court ordered the Detroit Board of Education to admit black children to schools previously restricted to white children. Public schools in Detroit had been segregated from an early time when black children first began to appear in the community. The legislation creating the Detroit schools and governing their operation was silent on matters of attendance. There was, however, which provided somewhat enigmatically that local schools should be open “to residents of any district therein.” For other purposes, the general school of laws had been regarded as inapplicable to the Detroit schools, for those schools were the subject of a separate body of legislation. Justice Campbell argued that the clause quoted was (like the rest of the general school code) inapplicable to Detroit schools and did not, in any case, address issues of racial assignment. But the majority, led by Cooley, rejected Campbell’s interpretation of the statutes and held that the Detroit practice violated the new state law.¹⁴⁶ Cooley also slyly noted that since the statute applied, “it does not become important to consider what would otherwise have been the

140. FREUND op. cit. n. 111 at 755.

141. 2 STORY op. cit. n. 4 at 676.

142. The term was in fact taken from the Magna Charta. It does not appear with the Due Process Clause in the Fifth Amendment to the Constitution of the United States, but only in the Fourteenth, which limits the powers of the state legislatures.

143. 2 STORY op. cit. n. 4 at 677.

145. HODDING CARTER, *THE ANGRY SCAR: THE STORY OF RECONSTRUCTION* 346-47 (1959); JOHN HOPE FRANKLIN, *RECONSTRUCTION AFTER THE CIVIL WAR* (2d ed., 1994).

146. *People v. Bd. of Educ. of Detroit*, 18 Mich. 400 (1869).

law,"¹⁴⁷ thus implying the possibility that the practice of the Detroit schools was constitutionally proscribed. He refrained from quoting his own recently published text elaborating on his statement that "[e]quality of rights, privileges, and capacities unquestionably should be the aim of the law."¹⁴⁸ Nor did he refer to the Equal Protection Clause of the recently adopted Fourteenth Amendment to the Constitution of the United States. Had he even in dicta pursued the avoided constitutional issue, his court's decision would have been a precedent of some weight favoring the dissent in the 1896 decision of the Supreme Court of the United States in *Plessy v. Ferguson*.¹⁴⁹ And he might have enshrined his name in the history of the civil rights movement.

Fourth, Section 5 of the Fourteenth Amendment empowered Congress to enforce its provisions. Cooley explained the need for this provision as arising from the possibility that equal protection of the laws might be denied other than by direct denial by the state. He approved the Civil Rights legislation of 1871 as a proper use of Section 5.¹⁵⁰

Finally, Cooley noted, in a passage demonstrating that he was not the mystic seer Max Lerner and others presumed him to be and had no idea of constitutionalizing laissez-faire:

Important as [its provisions] unquestionably are, it is nevertheless to be observed that they have not been agreed upon for the purpose of enlarging the sphere of the powers of the general government or of taking from the states any of those just powers of government which in the original Constitution were "reserved to the States respectively." The existing division of sovereignty which had been found equal to the preservation of our liberties, not only in time of peace and general harmony but in the trials of a most desperate civil strife, is not disturbed by it[.]. . . The states, in adopting it, have not struck blindly and fatally at their reserved powers; they have rather given security that in certain important particulars they will not pervert or abuse them.¹⁵¹

Lerner supposed that Cooley should have foreseen what Holmes observed in 1930:

I have not yet adequately expressed the more than anxiety that I feel at the ever increasing scope given to the Fourteenth Amendment in cutting down what I

147. 18 Mich. at 414.

148. Constitutional Limitations op. cit. n. 1 at 393. He did, however, acknowledge the force of a state constitutional provision limiting the elective franchise to whites. Id. at 394. The Fifteenth Amendment to the Constitution of the United States trumped this Michigan constitutional provision, but not until 1870.

149. 163 U.S. 537, 557 (1896)(Harlan, J. dissenting). Cf. *Strauder v. West Virginia*, 100 U.S. 303 (1880)(holding that the Equal Protection Clause precludes state from restricting jury service to white persons). On the other hand, Cooley as chair of the interstate Commerce commission might be said to have invented the idea of "separate but equal" approved by the Court in *Plessy*. But the requirement of equality in railroad cars was enforced by Cooley's commission, with the result that there was very little separation of races in rail transport in the 19th century. Had the Court been equally vigorous in requiring equality among public schools, race relations in the twentieth century would have been a very different tale.

150. 2 STORY op. cit. n. 4 at 677. See Act of April 20, 1871, 17 Stat. 13.

151. 2 STORY op. cit. n. 4 at 683-685.

believe to be the constitutional rights of the states. . . . I see hardly any limit but the sky to the invalidating of those rights if they happen to strike a majority of this Court as for any reason undesirable.¹⁵²

Perhaps the pivotal even of the evolution that excited Holmes' "more than anxiety" was the decision of the Supreme Court in *Lochner v. New York*.¹⁵³ *Lochner* was decided in 1905, the year that Ernst Freund published his work on the police power¹⁵⁴ and seven years after the death of Cooley.¹⁵⁵ The New York legislature had amended its labor code to forbid bakeries to employ bakers for more than 10 hours a day or 60 hours a week (a work week much closer to the average American's work week than readers in the late twentieth century readily imagine). *Lochner*, the owner of a bakery shop, was convicted of working his bakers an excessive number of hours. *Lochner*'s lawyers cited numerous decisions of the Supreme Court and the recently published Freund treatise, as well as Cooley, for the proposition that the Court was obligated to decide whether there really is something significantly different about bakeries which would justify a special rule limiting hours of employment.¹⁵⁶ They emphasized that the law applied only to bakers in bakeries and not those working in hotels or other places where bread is made, many of which provided their workers with more unhealthy work environments than did bakeries which were regulated by other provisions of the same statute to assure a reasonably health workplace. New York argued in defense of its law that *Lochner* had not carried the burden of persuasion that the statute was irrational. The state supplied the Court with no history or data justifying the regulation of hours of work or justifying a difference between bakers in bakeries and bakers in hotels, but merely asked the Court to take notice that New York legislators are presumptively reasonable.

A majority of the Court found that there was nothing special about bakeries, and held that the New York law was therefore "class legislation" violating the principle of equality in legislation and therefore proscribed by the Fourteenth Amendment. They emphasized that

[t]here is no contention that bakers as a class are not equal in intelligence and capacity to men in other trades or manual occupations . . . They are in not sense wards of the state.¹⁵⁷

Finding that the law regulated labor and not health, the Court compared it to state laws forbidding the shoeing of horses without a license, a form of legislation recently invalidated by courts in New York¹⁵⁸ and Illinois.¹⁵⁹

152. *Baldwin v. Missouri*, 281 U.S. 686, 595.

153. 198 U.S. 45 (1905).

154. FREUND op. cit. n. 111.

155. And six years after the death of Field.

156. Brief for plaintiff in error at 16, 24-27.

157. 198 U.S. at 56.

158. *People v. Beattie*, 89 N.Y. Supp. 193 (App. Div. 1904).

159. *Bessette v. People*, 193 Ill. 334 (1903).

They concluded that the public interest was "not in the slightest degree affected"¹⁶⁰ by the bakers' hours of work.

Justice Harlan's dissent proceeded from the same legal premise as the majority but perceived its application to bakers in a different light. One justice joining in this dissent was Justice Day, Cooley's former student and intimate friend.¹⁶¹ This dissent took notice of the history of bakers' ill health and of literature reporting the dangers of prolonged inhalation of flour.¹⁶² While conceding that the legislation might have been initiated with an illicit legislative purpose, the dissent presumed that the legislature had determined "upon the fullest available information, and for the common good" that too many hours in a dusty bakery is especially harmful to workers.¹⁶³

Some disinterested commentators thought the decision correct.¹⁶⁴ Roscoe Pound, however, forcefully criticized the majority opinion for its ignorance of the facts and took it as an occasion to advance his argument for what he denoted as sociological jurisprudence, i.e., the making of law on the basis of knowledge of law's social consequences.¹⁶⁵ Critical of the Court, but perhaps somewhat ambivalent, was Andrew C. McLaughlin, a former student of Cooley who revered him.¹⁶⁶ McLaughlin, stating views that Cooley would have been likely to share, observed that

[w]e have outgrown in business activity and in social sentiment the conditions of individualism that were dominant in the early days of the Republic and for decades thereafter; we are face to face with the fact that society has duties and responsibilities and that any principles which set up isolated and individual right as over against community interest are at least fraught with danger, if they are not pure anachronism.¹⁶⁷

Nevertheless,

[i]f a law to limit the hours of bakers, like that of New York recently passed on by the courts, has for its purpose, not the uplifting and protection of the health

160. 198 U.S. at 57.

161. Joseph E. McLean, William Rufus Day, Supreme Court Justice from Ohio 18 (1946); Day lived in the Cooley home while a student.

162. 198 U.S. at 70.

163. 198 U.S. at 60.

164. E.g., S. Whitney Dunscomb, *The Police Power and Civil Liberty*, 6 COL. L. REV. 95 (1906).

165. *Do We Need a Philosophy of Law?* 18 YALE L. J. 454 (1905); *The Need of a Sociological Jurisprudence*, 19 GREEN BAG 607 (1907); *Liberty of Contract*, 18 YALE L. J. 454 (1909).

166. See e.g., Andrew C. McLaughlin, Thomas McIntyre Cooley, 4 DICTIONARY OF AMERICAN BIOGRAPHY 392 (Alan Johnson & Dumas Malone eds., 1930). McLaughlin graduated in law at Michigan and then became a distinguished American historian, concluding his career at the University of Chicago. When Cooley resigned from the law faculty in 1884, McLaughlin assumed responsibility for instruction in Constitutional Law. Note, 2 MICHIGAN ALUMNUS 7 (1895).

167. *The Power of a Court to Declare Law Unconstitutional in The Courts, the Constitution and Parties* 3, 3-4 (1912) (hereafter cited as *the Courts*).

and well-being of the community, but the giving of advantage to a certain class of workers without regard for the rights and desires of the rest, or if it is merely an attack on an employer's right of contract, it can hardly be supported as an exercise of the police power.¹⁶⁸

Freund, in commenting on *Lochner*, made a similar concession to the principle of equality in legislation, but criticized the majority's blindness to the reality of working conditions in bakeries.¹⁶⁹ He emphasized that the issue raised by an application of the principle of equality in legislation is often one of fact, not law. The majority had ignored the evidence on the central issue, i.e., whether there is something especially dangerous about working long hours in bakeries. Freund hoped that the Court when better informed would reach the opposite conclusion. And it was, indeed, a very short time before Louis Brandeis, Freund's political ally, would as an advocate persuade the Court to sustain a regulation of working conditions for women by presenting in his brief a surfeit of detailed social data as justification of the legislation under attack.¹⁷⁰

Whether a "Brandeis brief" could have turned the Court in *Lochner* is uncertain. In any case, as Pound, McLaughlin, Freund, and Brandeis recognized, the outcome depended very little on the verbal formulation of the legal principle applied (the only part of the decision in any way connected with the Cooley treatise) and very much on what the Justices knew, or thought they knew, about bakeries. The majority opinion in *Lochner* would be cited in a series of cases in which the Supreme Court found progressive state legislation unconstitutional,¹⁷¹ but the Court came in time to sustain must exercises of the police power upon a minimal showing of real effects on health and safety justifying the enactments.¹⁷²

Almost casual was the *Lochner* dissent of Justice Holmes, writing

168. *A Written Constitution in Some of Its Historical Aspects in The Courts* 5 MICH. L. REV. 605, 620 (1907).

169. *Limitation of Hours of Labor and the Federal Supreme Court*, 17 GREEN BAG 411 (1905).

170. *Muller v. Oregon*, 208 U.S. 412 (1908). For a recent review of that decision, see Nancy Erickson, *Muller v. Oregon Reconsidered: The Origins of a Sex-Based Doctrine of Liberty of Contract*, 30 J. LABOR HIST. 228, 233 (1989) (hereafter cited as Erickson). Erickson disapproved of the result as an impairment of women's freedom of contract. Her reaction is a lively example of the difficulty of applying the moral and political values of our time to events a century past. As she acknowledges, Florence Kelley (with the support of men such as Ernst Freund and Louis Brandeis) strove to secure legislation limiting hours of work for women as a great and humane reform. 19th and early 20th century Progressives exulted in such enactment. Today, they seem anachronistic.

171. *E.g.* *Adair v. United States*, 208 U.S. 161 (1908); *Coppage v. Kansas*, 236 U.S. 1 (1914); *Adkins v. Children's Hospital*, 261 U.S. 525 (1923).

172. David P. Currie emphasizes that *Lochner* "did not usher in a reign of terror for social legislation." *The Constitution in the Supreme Court: The Second Century 1888-1986* 47 (1990). See also Melvin I. Urofsky, *Myth and Reality: The Supreme Court and Protective Legislation in the Progressive Era*, 1983 YEARBOOK OF SUPREME COURT HISTORICAL SOCIETY 53. For an account of the demise of the doctrine of legislative equality, see GILLMAN *op. cit.* n. 14 at 147-194.

only for himself.¹⁷³ He refused to join issue on the factual question whether there is or is not something special about bakeries. He simply dismissed the majority as unduly preoccupied with a deductive methodology that proceeded from a false premise.¹⁷⁴ He accused the Court of deciding the case "upon an economic theory which a large part of the country does not entertain." The theory he attributed to the majority was laissez-faire economics derived from the social Darwinism of Herbert Spencer.¹⁷⁵ Ironically, Holmes may have been the member of the *Lochner* Court most sympathetic with the tenets of social Darwinism.¹⁷⁶ Yet his cryptic opinion damning the majority as Spencer's adherents may have been an important source of the impression of later historians that Cooley, although his treatise so warmly approved by Holmes was not cited by the *Lochner* Court, must also be such an adherent.¹⁷⁷

There is no reason to believe that Cooley, had he been alive and on the Court, would have joined the majority in *Lochner*. His adherence as a judge to the principles of self-restraint would alone have assured his deference to the New York legislature on such a matter. Moreover, Cooley was an advocate of health and safety law. Not only in Constitutional Limitations,¹⁷⁸ and again in his chapter on the Fourteenth Amendment, but also in his more popular writing, he asserted the need to subordinate property and contract rights to the protection of public health and safety.

173. 198 U.S. 45, 75.

174. Pound celebrated Holmes' opinion as "the best exposition ... of sociological jurisprudence" for its rejection of the deductive methodology. *Liberty of Contract*, 18 YALE L. J. 454, 464 (1909).

175. SPENCER *supra* n. 12. On the influence of Spencer, see MARY O. FURNER, *Advocacy & Objectivity: A Crisis in the Professionalization of American Social Science 1865-1905* 31, 43, 199, 231, 290, 308 (1975); DOROTHY ROSS, *THE ORIGINS OF AMERICAN SOCIAL SCIENCE* 55-56, 64, 105-106 (1992)(hereafter cited as ROSS).

176. G. EDWARD WHITE, *JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF* 360 (1993):

[Holmes] was an unreconstructed social Darwinist on economic issues, believing in competition but also in combination as the logical end of competition. He was not at all interested in the humanitarian dimensions of work in an industrialized society. He did not think redistributive legislation had any meaningful effect, believing that consumption was the major pressure point of economic activity and that economic regulation only shifted the "bill" from one sector of the consuming public to another. He deferred to state legislation only because he did not think it appropriate for judges to pour substantive meaning into constitutional language absent an overwhelming textual mandate. He was not interested in social assimilation or the breaking down of class barriers, did not believe the future was an improvement on the past, and did not favor the state as an omnipresent policymaking force.

See also ROSS *op. cit.* n. 175 at 66. Holmes' view of Spencer was expressed in his *Summary of Events, Great Britain*, 7 AM. L. REV. 582 (1873). In that essay, he was critical of social Darwinism as "laying down a theory of government intended to establish its limits once for all by a logical deduction from axioms." However, he went on to assert that "a man rightly prefers his own interest to that of his neighbors" and that law "like every other device of man or beast, must tend in the long run to aid the survival of the fittest."

177. GILLMAN *op. cit.* n. 14 at 3.

178. *Constitutional Limitations op. cit.* n. 1 at 595.

He did not hesitate to support stringent quarantine and environmental laws to restrict the exercise of individual rights that endangered others.¹⁷⁹ He also favored stronger regulation of enterprise to protect the land, deploring the savaging of timber resources by American pioneers. And in his revision of Story, as we have seen, he supported the prohibition of intoxicating liquors, perhaps the most extreme form of public health paternalism then practices.¹⁸⁰

Cooley would not, on the other hand, have joined in the opinion of Justice Holmes.¹⁸¹ Cooley believed that the principle Holmes was prepared to ignore was the essence not only of the Equal Protection Clause of the Fourteenth Amendment, but also of the pre-existing state constitutions embodying the Jacksonian doctrine of Equal Rights. That doctrine imposed on the Court a solemn duty to prevent the New York legislature from succumbing to the blandishments of the rich and the powerful, or the well organized bakers, seeking advantage over those lacking influence in the corridors of power. He could have not joined in Holmes' washing of hands, but would have joined Justice Harlan in requiring a showing that New York had reasons that could withstand scrutiny in light of day.

Cooley's writing on the Fourteenth Amendment has drawn a second line of criticism seemingly at war with the assertions of those blaming him for the excessive activism of the Supreme Court in limiting the police power of the states. The competing criticism is that Cooley bears some responsibility for the failure of Reconstruction.¹⁸² Philip Paludan, for example, contended that Cooley's view of the role of the Court in interpreting the Privileges and Immunities and Equal Protection Clauses of the Amendment was unduly narrow. Paludan's criticism comes not from the generation enamored with the wisdom and humanity of the New Deal, but from a later generation viewing Cooley's writing from the perspective of *Brown v. Board of Education*.¹⁸³ Paludan contends that Cooley failed to recognize that the Civil War had not merely saved the union, but had transformed it, resulting in the empowerment of the Supreme Court of the United States to impose its notions of equality on the state governments, especially those in the South. But in this error, if error it was, Cooley spoke for his time. Had the Fourteenth Amendment been presented to the generation who so reviled *Dred Scott* as a new commission to the Court to impose on suspect legislatures its doubtful wisdom on a wide range of social and economic issues, it would not merely have failed of ratification,

179. What Can the Law Do for The Health of The People?, in 1882 Annual Report of the Michigan State Board of Health 7.

180. In 1885, Cooley accepted the nomination of the Prohibition Party as well as that of the Republican Party. That may well have cost him some votes. George Edwards, *Why cooley Left the Bench: A Missing page of Legal History*, 33 WAYNE L. REV. 1563, 1570 (1987).

181. "Best known," Cass Sunstein concludes, "for its apparent humility." *Lochner's Legacy*, 87 COLUM. L. REV. 873, 879 (1987).

182. E.g., PALUDAN, op. cit. n. 130.

183. 347 U.S. 483 (1954).

but would have been repudiated on almost every side. The Amendment was presented to the people in the only way that it could have won approval, as an instrument declaratory of existing rights.¹⁸⁴ No honest legal writing of Cooley's time could have described the effect of the Amendment in terms less modest than those Cooley employed.

IV. CONCLUSION

In their misperception of the aims of *Constitutional Limitations* and their erroneous assumption that it was a significant cause of the development of American constitutional law even in the twentieth century, historians and others may have been misled by the style of judicial opinions.¹⁸⁵ Most opinions of a court are written defensively. They tend to disavow personal responsibility of judges for the political consequences of their decisions. One need not be a judge to recognize the prudence of attributing one's unwelcomed decisions to others, preferably some abstract other, such as "the law" or "the rules" or "management." Moreover, this style of disavowal serves to remind judges that they have professional duties to restrain their personal impulses, that indeed the law is not their to shape to their personal desires. To the author of an opinion of the court, the most attractive citation may well be one invoking an authority that might be expected to be resistant to the result being justified, for such citations tend to confirm the disinterestedness of the court.

But the style of deference to authority seldom if ever so beguiles an American judge that he or she would heed the advice of a mere treatise writer on a politically sensitive question. Beneath the veneer of deference to authority are found in most American judges the strong wills of politically active persons. They are almost without exception persons with ideas of their own about the merits of significant legislation and about the appropriate measure of the judicial role in imposing constitutional limitations.¹⁸⁶ Even a fellow judge as eminent as Cooley, as a mere text-writer having no vote in the collegium, is unlikely to have significant influence on the resolution of particular issues having substantial political content. To be cited by a court on an issue laden with political implications is not to have influence, but to be used.

For example, Cooley would not have materially influence the constitutional decisions of Justice Stephen Johnson Field.¹⁸⁷ Field was the younger brother of David Dudley, and in his youth, with his brother, an

184. HOWARD J. GRAHAM, *EVERYMAN'S CONSTITUTION* 295-336 (1968); JACOBUS TEN BROEK, *EQUAL UNDER LAW* 94-108 (1965).

185. Lawyers may also sometimes forget. E.g. Erickson, *op. cit.* n. 170 at 232-233.

186. Contrast the training and experience of the English judiciary. PATRICK S. ATIYAH & ROBERT S. SUMMERS, *FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW: A COMPARATIVE STUDY IN LEGAL REASONING, LEGAL THEORY, AND LEGAL INSTITUTIONS* 336-358 (1987).

187. See Charles McCurdy *Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez Faire Constitutionalism*, 61 J. AM. HIST. 970 (1975).

ardent advocate of the Jacksonian doctrine of Equal Rights. He had moved to California in the Gold Rush of 1849, gained election to the Supreme Court of California, and been appointed by President Lincoln in 1864 to the Supreme Court of the United States. Perhaps as much as any other Justice, Field was responsible for enlarging the Fourteenth Amendment restraint on the state police power. Field had served in the rustic California legislature of the 1850s and was keenly aware of the ignorance and venality sometimes controlling the actions of such bodies. Moreover, he served on the Court for over three decades, an experience that did not diminish his confidence that his political wisdom was superior to that of almost any legislature. And he had experienced many years of abuse (possibly merited abuse) from members of "the public," leading his biographer to conclude that he felt little sympathy for the masses, whom he regarded as an ugly mob.¹⁸⁸ He was for these reasons increasingly quick to conclude that legislation was so violative of the principle of Equal Rights as to be vulnerable to challenge under the Fourteenth Amendment. Justice Field preferred to find the textual basis for limiting the power of state legislatures not in the Due Process Clause, but in the Privileges and Immunities Clause.¹⁸⁹ Field also invoked the Declaration of Independence in support of his view that the right to the "pursuit of happiness" included the right to pursue any lawful business or vocation.¹⁹⁰ While Field's broad interpretation of the Privileges and Immunities Clause did not prevail, he was surely much more influential than Cooley in moving his brethren¹⁹¹ in the direction of what today might be described as strict scrutiny of economic regulation by the states.

By helping lawyers and courts find what other courts were doing and thinking, Constitutional Limitations did contribute to the socializing influence on later judges of the traditions wrought by those who had come before. Most judges invalidating particular exercises of the police power (who were on that account later identified as "conservative") were indeed simply employing the rhetoric and the traditions of their predecessors faithfully reported and synthesized by Cooley. But they were invoking the rhetoric and the tradition in circumstances quite different from those that were in the minds of those forebears. If they sometimes erred, it was their flawed judgment and not the rhetoric or the tradition they invoked for support of that judgment that was chiefly responsible.

188. CARL BRENT SWISHER, STEPHEN J. FIELD, CRAFTSMAN OF THE LAW 428 (1930).

189. "No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States ..." Field's position was developed in his dissenting opinion in *The Slaughterhouse Cases*, 83 U.S. 36 (1873). See also *Bertemeyer v. Iowa*, 85 U.S. 129 (1874).

190. *Butchers' Union v. Crescent City Livestock Lending and Slaughterhouse Co.*, 111 U.S. 746, 756 (1884). He also cited Adam Smith, long a favorite with the followers of William Leggett, in concluding that the right to butcher livestock is an inalienable right.

191. Howard J. Graham, *Justice Field and the Fourteenth Amendment*, 52 YALE L. J. 851 (1943); Charles W. McCurdy, *JUSTICE FIELD AND THE JURISPRUDENCE OF GOVERNMENT BUSINESS RELATIONS*, 61 J. AM HIST. 970 (1975).

Reconsideration of the first part of *Constitutional Limitations* confirms the instrumental nature of legal citation. There, as we have seen, Cooley strenuously cautioned against self-aggrandizement by judges. Had later courts invalidating progressive state legislation paid heed to this part of the treatise, and embraced the principle of self-restraint announced by Cooley, they would have reached very different results. Indeed, they would have upheld even legislation that they regarded as probably unconstitutional; so long as they acknowledged doubt about the appropriateness of an exercise of power, they would have withheld judgment.

Those twentieth century judges who found in Cooley's texts authority for the invalidation of progressive legislation were engaging in a form of verbal manipulation all too common among lawyers and judges. Alas, some of the New Deal historians who blamed Cooley for the poor judgment of his successors were often no more faithful to Cooley's meanings than were the judges rendering the decisions they disapproved. Nor, again alas, have some of the more recent students of Cooley's work, who have found in it signs of a dark purpose to facilitate the oppression of women, minorities, laborers, and other victims of capitalist predation. Cooley, like the judges whose opinions he faithfully synthesized, was motivated by no such aims. He was, to use a term now again in vogue, a pragmatist¹⁹² trying to help courts shaping their constitutions to serve citizens as they might have hoped to be served.

192. Jack Balkin, *The Promise of Legal Semiotics*, 69 TEX L. REV. 1831 (1991).